

Ohare (Migration) [2022] AATA 104 (10 January 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Barry Thomas Ohare
CASE NUMBER:	1926253
HOME AFFAIRS REFERENCE(S):	BCC2017/2718310
MEMBER:	Christine Kannis
DATE:	10 January 2022
PLACE OF DECISION:	Perth
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 10 January 2022 at 7:33am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and ongoing relationship – shared household expenses and responsibilities – regular social activities – general support statements – plans to commence a family – de facto relationship for at least 12 months – compelling and compassionate circumstances – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359, 363

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.09, 2.03A

CASES

Hasran v MIAC [2010] FCAFC 40

He v MIBP [2017] FCAFC 206

Paduano v MIMIA [2005] FCA 211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 31 July 2017 on the basis of his relationship with his sponsor, Ms Thyzara Lyn Griffith. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by the applicant.
3. The visa was refused because the delegate was not satisfied that the applicant's relationship with the sponsor met the definition of a de facto relationship under the Act and therefore he did not satisfy cl.820.211(2). The delegate also decided that the applicant did not meet the additional criteria in r.2.03A.
4. A copy of the Decision Record was submitted to the Tribunal by the applicant for the purposes of the review.
5. On 9 December 2021, the Tribunal wrote to the applicant pursuant to s 359(2) of the Act, inviting him to provide evidence of the relationship with the sponsor at the time of application and time of decision. The invitation advised that if the information was not provided in writing by 23 December 2021, the Tribunal may make a decision on the review without taking further steps to obtain the information and he would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.
6. The applicant did not provide the information within the prescribed period and no request for an extension of time was received. In these circumstances, s.359C of the Act applies, and pursuant to s.360(3) of the Act, the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if an applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. On 24 December 2021, the Tribunal advised the applicant that he had lost his entitlement to appear before the Tribunal. He was also advised that the Tribunal had decided to allow him additional time within which to provide any further information failing which the Tribunal would make a decision based on the information available. The Tribunal advised the applicant that the information must be provided by 7 January 2022.
7. The applicant did not provide any information by 7 January 2022.
8. The applicant was represented in relation to the review by his registered migration agent.
9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue to be considered is whether the applicant was the de facto partner of the sponsor within the meaning of s.5CB of the Act at the time of application and, whether at the time of decision, he continues to be the de facto partner of the sponsor.

Whether the parties are in a spouse or de facto relationship

11. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant is sponsored by a person who is an Australian citizen.
12. 'De facto partner' is defined in s.5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the household and the persons' commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

13. *Background*

14. The applicant is an Irish national.
15. In the *Application for migration to Australia by a partner* the applicant indicated that he first met the sponsor on 15 July 2016 in Perth and that they committed to a shared life together to the exclusion of all others on 4 August 2016.
16. The Tribunal considered the evidence against the r.1.09A(3) matters.

17. *Financial aspects of the relationship*

18. The Tribunal has taken into account the evidence provided as to the financial aspects of the relationship including joint ownership of assets, joint liabilities, any legal obligations owed to the other party, the extent of pooling of financial resources and any sharing of day-to-day household expenses.
19. In the *Application for migration to Australia by a partner* the applicant stated that he and the sponsor share household shopping bills, fuel bills, food for their chickens, ducks and dog and their entertainment expenses.
20. In a statutory declaration dated 20 July 2017 the applicant said the sponsor owns her own home and since moving in he has contributed towards the grocery, fuel and utilities bills. He said he and the sponsor have a joint bank account. He said once the sponsor finalises her divorce, she will add his name to her mortgage so they can pay off and own a house together. He said they share the weekly shopping and take turns paying for fuel. In a statutory declaration dated 20 July 2017 the sponsor gave generally consistent evidence in this regard.
21. There is no evidence before the Tribunal of joint ownership of assets or joint liabilities at the time of application and the time of decision. There is no evidence before the Tribunal to substantiate the applicant's claim that household expenses are shared at the time of application and the time of decision.
22. The applicant's superannuation Australian Super statement dated 11 July 2017 showing the sponsor is nominated as his sole beneficiary was provided. The Tribunal gives this some weight.

23. The Tribunal decided there is insufficient evidence in relation to the financial aspects of the relationship at the time of application and no evidence of the financial aspects of the relationship at the time of decision. The Tribunal finds that the available evidence does not demonstrate that the parties are in a genuine and continuing de facto relationship at the time of application and at the time of decision.

24. Given the limited evidence, the Tribunal places minimal weight on the evidence of the financial aspects of the relationship.

25. *Nature of the household*

26. The Tribunal has taken into account the evidence as to the nature of the household including any joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.

27. In the *Application for migration to Australia by a partner* the applicant stated that he and the sponsor share their house with two housemates. He said he and the sponsor share cleaning duties and he mainly attends to the garden and the sponsor looks after their chickens and ducks. In a statutory declaration dated 20 July 2017 the sponsor said the applicant does most of the outside duties and she looks after meals and washing. She said they both take care of their dog, chickens and ducks. She also said they shared their home with two housemates.

28. Correspondence addressed individually to the applicant and the sponsor at Bulong Avenue Redcliffe WA 6104 in 2017 was provided. The Tribunal gives this some weight.

29. The Tribunal decided there is insufficient evidence in relation to the nature of the household at the time of application and no evidence of the nature of the household at the time of decision.

30. Given the limited evidence, the Tribunal places minimal weight on the evidence of the nature of the household.

31. *Social aspects of the relationship*

32. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether parties represent themselves to other people as being in a de facto relationship or a spousal relationship with each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.

33. In the *Application for migration to Australia by a partner* the applicant stated that he and the sponsor socialised with friends on weekends and every second weekend they spent time with the sponsor's parents.

34. In a statutory declaration dated 20 July 2017 the applicant said he and the sponsor spend their leisure time going to bars and restaurants on weekends, going to the cinema and walking their dog together. He said they were planning to attend a wedding in Bali in 2018 and also to visit his parents in Ireland. In a statutory declaration dated 20 July 2017 the sponsor gave generally consistent evidence in this regard.

35. Documents evidencing joint travel by the parties to Bali in April 2018 was provided.

36. A statutory declaration dated 26 July 2017 made by Ms Deborah Griffith was provided. Ms Griffiths is the sponsor's mother. At the time of making the statutory declaration Ms Griffiths

had known the applicant for 11 months. She said she met him in “August last year” and said the parties have dinner with her and her husband every second weekend. Ms Griffiths’ reasons for her belief that the parties’ relationship is genuine and continuing included that the applicant has a positive effect on the sponsor and shows her respect and genuine affection. She said the applicant demonstrates concern for the sponsor’s physical and emotional wellbeing. She said the applicant has been welcomed into their family. The Tribunal gives this evidence some weight.

37. A statutory declaration dated 21 July 2017 made by Mr Paul Gordon was provided. Mr Gordon indicated that he had known the applicant for two years and the sponsor for one year. He said he lived with the parties from April 2017. Mr Gordon’s reasons for his belief that the parties’ relationship is genuine and continuing included that he can see they are happy together and said he rarely sees them apart. He said they get on well with each other and make each other laugh. The Tribunal gives this evidence some weight.
38. A statutory declaration dated 20 July 2017 made by Ms Alexandra Whiley was provided. Ms Whiley indicated that she had known the applicant for 12 months and the sponsor for 18 months. She said she socialised with the parties on occasion. Her reasons for her belief that the parties’ relationship is genuine and continuing included that she is aware of many details of the relationship and believes there is longevity in the union. Given the general nature of these reasons, the Tribunal gives this evidence minimal weight.
39. A statutory declaration dated 22 July 2017 made by the sponsor’s neighbour, Ms Sarah Bellow was provided. Ms Bellow indicated that she had known the applicant for 12 months and the sponsor for four years. She said the parties often come to her house for dinner and drinks. Her reasons for her belief that the parties’ relationship is genuine and continuing included that they live together and are genuinely loving and caring towards each other. Given the general nature of these reasons, the Tribunal gives this evidence minimal weight.
40. Photos of the parties together including photos indicated to have been taken on Rottnest Island and at Cottesloe Beach were provided. There was no indication of the dates the photos were taken. The photos, with the exception of one photo, were only of the parties themselves and did not show them socialising with other people.
41. The applicant’s superannuation Australian Super statement indicates that his relationship with the sponsor is “spouse”.
42. The Tribunal accepts that the sponsor’s mother, friends, and a neighbour provided statutory declarations attesting to the genuineness of the parties’ relationship at the time of application. The evidence provided by two of the declarants does not provide persuasive reasons for their beliefs about the nature of the relationship and three of the declarants had known the applicant for 12 months or less at the time of declaration.
43. Given the limited evidence and concerns noted above, the Tribunal places limited weight on the evidence of the social aspects of the relationship at the time of application. There is no evidence before the Tribunal about the social aspects of the parties’ relationship at the time of decision.
44. *The nature of the persons’ commitment to each other*
45. The Tribunal has considered the evidence provided in relation to the nature of the persons’ commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other and whether they see the relationship as long term.

46. In the *Application for migration to Australia by a partner* the applicant stated that he and the sponsor were at the stage that they want to try to have a baby together. He said they intend to marry.
47. In a statutory declaration dated 20 July 2017 the applicant said his future plans include having children with the sponsor and said they were currently trying for their first child. He said they hope to purchase another property in the future. In a statutory declaration dated 20 July 2017 the sponsor gave generally consistent evidence in this regard. She also said she was about to commence divorce proceedings in relation to a previous relationship.
48. The Tribunal decided there is insufficient evidence in relation to the nature of the persons' commitment to each other and finds that the available evidence does not demonstrate that the parties are in a genuine and continuing de facto relationship at the time of application. The Tribunal accepts that the parties each expressed an intention to have a child together at the time of application however there is no evidence to support whether they have had a child or whether they currently have a mutual commitment to a shared life together to the exclusion of others. There is no evidence of the parties providing emotional support to each other.
49. There is no evidence regarding the nature of the persons' commitment to each other at the time of decision.
50. The Tribunal gives little weight to the evidence of the nature of the persons' commitment to each other.

51. *Conclusion*

52. The Tribunal acknowledges that some elements of the evidence support the parties' claims about the genuineness of their relationship. However, having considered carefully all the evidence cumulatively and collectively, including the reg 1.09(3) matters to which it is required to have regard, the Tribunal is not satisfied that the weight of evidence supports a finding that the parties are in a genuine and continuing relationship and have a mutual commitment to a shared life together to the exclusion of all others, either at the time of application or the time of decision.
53. Regarding whether the requirements of s.5CB(2) were met at the time of application and at the time of decision, the Tribunal decided:
- the parties are not married;
 - there is insufficient evidence to demonstrate that the parties live together or do not live apart on a permanent basis;
 - the parties are not related by family;
 - there is insufficient evidence to demonstrate that the parties have a mutual commitment to a shared life together to the exclusion of others; and
 - there is insufficient evidence to demonstrate that the parties' relationship is genuine and continuing.
54. On the basis of the above, the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time the application was made or the time of this decision.
55. Therefore, the applicant does not meet cl 820.211(2) and cl 820.221.

56. There is no evidence before the Tribunal and no claims have been made that the applicant meets the alternative criteria in c.820.211(7), 820.211(8), 820.211(9), 820.221(2), 820.221(3) (death, family violence, child exceptions).

57. Are the additional criteria for a de facto relationship met?

58. For completeness the Tribunal has also considered whether the applicant meets r.2.03A.

59. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the de facto relationship must have existed for at least the period of 12 months ending immediately before the date of the application, unless the applicant can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5). These exceptions do not apply in the present case.

60. The Tribunal accepts on the evidence before it that the applicant and the sponsor were over the age of 18 at the time of application. Therefore, the applicant satisfies r.2.03A(2).

61. The Tribunal then considered r.2.03A(3). In the *Application for migration to Australia by a partner* the applicant indicated he and the sponsor first met on 15 July 2016 and that their de facto relationship began on 15 July 2016. In the *Application for migration to Australia by a partner* the applicant also indicated that he and the sponsor committed to a shared life together to the exclusion of all others on 4 August 2016.

62. The Tribunal does not accept that the applicant and the sponsor commenced a de facto relationship on the date they first met. The Tribunal accepts the information provided by the applicant in the *Application for migration to Australia by a partner* that he and the sponsor committed to a shared life together to the exclusion of all others on 4 August 2016.

63. The application was made on 31 July 2017. Accordingly, the Tribunal is not satisfied that the parties were in a de facto relationship for at least the period of 12 months ending immediately before the date of the application.

64. Therefore, the issue before the Tribunal is whether the visa applicant can establish compelling and compassionate circumstances for the grant of the visa: reg 2.03A(3). The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211.

65. There is nothing before the Tribunal to suggest there are any compelling and compassionate circumstances for the grant of the visa in this case. Accordingly, the Tribunal is not satisfied that there are compelling and compassionate circumstances for the grant of the visa.

66. For these reasons the Tribunal is not satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

67. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

68. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Christine Kannis
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).